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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

7 PEDRO R. DUARTE,

8 *Petitioner,*

9 vs.
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11 BRIAN WILLIAMS, *et al.*,

12 *Respondents.*
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Case No. 2:12-cv-01305-JAD-PAL

ORDER

14 This habeas matter under 28 U.S.C. § 2254 comes before the Court on respondents'
15 motion (Doc. 24) to dismiss. Respondents contend that a number of claims in the first
16 amended petition (Doc. 17) are unexhausted and/or fail to state a claim upon which relief may
17 be granted. The Court finds the argument unsupported and denies the Motion. The Court
18 also reconsidered its prior denial of the request to appoint counsel and finds that the interests
19 of justice dictate the appointment of counsel for Mr. Duarte.

20 ***Background***

21 Petitioner Pedro R. Duarte challenges his 2003 Nevada state judgment of conviction,
22 pursuant to a jury verdict, of one count of conspiracy to commit robbery, two counts of attempt
23 murder without the use of a deadly weapon, three counts of attempt robbery without the use
24 of a deadly weapon, and one count of possession of a stolen vehicle. Duarte challenged the
25 conviction in the state courts on direct appeal and in multiple state post-conviction petitions.

26 ***Governing Law***

27 Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust state court
28 remedies on a claim before presenting that claim to the federal courts. To satisfy this

1 exhaustion requirement, the claim must have been fairly presented to the state courts
2 completely through to the highest court available, in this case the state supreme court. *E.g.*,
3 *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003)(*en banc*); *Vang v. Nevada*, 329
4 F.3d 1069, 1075 (9th Cir. 2003). In the state courts, the petitioner must refer to the specific
5 federal constitutional guarantee and must also state the facts that entitle the petitioner to relief
6 on the federal constitutional claim. *E.g.*, *Shumway v. Payne*, 223 F.3d 983, 987 (9th Cir.
7 2000). That is, fair presentation requires that the petitioner present the state courts with both
8 the operative facts and the federal legal theory upon which the claim is based. *E.g.*, *Castillo*
9 *v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005). The exhaustion requirement insures that the
10 state courts, as a matter of federal-state comity, will have the first opportunity to pass upon
11 and correct alleged violations of federal constitutional guarantees. See, *e.g.*, *Coleman v.*
12 *Thompson*, 501 U.S. 722, 731 (1991).

13 Under *Rose v. Lundy*, 455 U.S. 509 (1982), a mixed petition presenting both exhausted
14 and unexhausted claims must be dismissed without prejudice unless the petitioner dismisses
15 the unexhausted claims or seeks other appropriate relief.

16 With regard to claims filed in federal court, federal habeas pleading is not notice
17 pleading; a habeas petitioner must state the specific facts that allegedly entitle him to habeas
18 relief. See *Mayle v. Felix*, 545 U.S. 644, 655-56 (2005). Even under the more liberal notice-
19 pleading standard applicable to general civil actions, conclusory assertions that constitute
20 merely formulaic recitations of the elements of a cause of action and that are devoid of further
21 factual enhancement do not state a claim for relief. See *Ashcroft v. Iqbal*, 556 U.S. 662, 677-
22 81 & 686 (2009). Accordingly, even under the more liberal notice pleading rules, the
23 allegations of a pleading must “permit the court to infer more than the mere possibility” that
24 a constitutional violation has occurred. 556 U.S. at 679. The stricter habeas pleading rules
25 similarly require more than “mere conclusions of law, unsupported by any facts.” *Mayle*, 545
26 U.S. at 655. A habeas petitioner instead must “state facts that point to a real possibility of
27 constitutional error.” *Id.*

1 While federal habeas pleading is not notice pleading, the allegations of a *pro se*
 2 pleading nonetheless are held to less stringent standards than formal pleadings drafted by
 3 lawyers. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). The law is well established that this
 4 less stringent standard applies fully to *pro se* habeas petitions. See, e.g., *Maleng v. Cook*,
 5 490 U.S. 488, 493 (1989); *Brown v. Roe*, 279 F.3d 742, 745-46 (9th Cir. 2002); *Zichko v.*
 6 *Idaho*, 247 F.3d 1015, 1020-21 (9th Cir. 2001).

7 **Discussion**

8 The Court will discuss all issues raised as to a ground in numerical ground order rather
 9 than addressing issues directed to the same ground in different parts of the order.

10 **Ground 1**

11 Respondents contend that ground 1 fails to state a claim on the following basis:

12 **Ground 1 Fails to State a Claim:**

13 When DUARTE filed his federal petition, he asserted that
 14 his right to due process of law under the 14th Amendment was
 15 violated when the State did not preserve evidence. However he
 16 fails to indicate to what constitution this amendment was attached.
 17 As stated, *supra*, a state prisoner is entitled to habeas relief only
 18 if he is being held in custody in violation of the constitution, laws
 19 or treaties of the United States. 28 U.S.C. § 2254(a). Unless an
 20 issue of federal constitutional or statutory law is implicated by the
 21 facts presented, the claim is not cognizable under federal habeas
 22 corpus. *Estelle v. McGuire*, 502 U.S. 62, 68, (1991).

23 Doc. 24, at 11-12.

24 Ground 1 begins as follows, with the non-underlined portions below reflecting the pre-
 25 printed portions of the Court's required petition form:

26 I allege that my state court conviction and/or sentence are
 27 unconstitutional, in violation of my Fourteenth Amendment
 28 right to Due Process of Law, based on these facts:

WHETHER THE DESTRUCTION OF EVIDENCE
CONSTITUTED A VIOLATION OF APPELLANT'S
FIFTH AND FOURTEENTH AMENDMENT
RIGHTS

In California v. Trombetta, the United States Supreme
Court addressed the issue of whether due process requires the
State to preserve potentially exculpatory evidence on behalf of
defendants. . . .

1 Doc. 17, at 3. Petitioner thereafter presents five pages of specific factual allegations on the
2 claim. He concludes with the allegation that, due to the State's alleged failure to preserve the
3 evidence in question, "Duarte's Fourteenth Amendment rights to due process were violated."
4 Doc. 17, at 7.

5 This is a busy court with a heavy docket. The most restrained comment that the Court
6 can make regarding respondents' argument is that it is patently frivolous. Even without liberal
7 construction of *pro se* pleadings, it is abundantly clear that a habeas petitioner filling in
8 "Fourteenth" in front of the word "Amendment" on the Court's required petition form is relying
9 on the Fourteenth Amendment of the United States Constitution. Any doubt in that regard –
10 as unreasonable as it would be – would be immediately removed by petitioner's citation
11 immediately to a United States Supreme Court case applying the Due Process Clause of the
12 Fourteenth Amendment of the United States Constitution. If counsel presents a similar
13 argument again, counsel can expect to be directed to show cause why sanctions should not
14 be imposed.

15 Respondents further contend that Ground 1 is not exhausted. They claim that
16 petitioner presented a claim in the state courts only of ineffective assistance of trial counsel
17 based on counsel's failure to present a challenge based on the state's failure to preserve the
18 evidence. Respondents urge that petitioner did not present an independent substantive claim
19 under the Due Process Clause of the Fourteenth Amendment based on the State's failure to
20 preserve the evidence.

21 The substantive claim in federal Ground 1 would appear to be virtually identical to the
22 first substantive claim presented to and addressed by the state supreme court on Duarte's
23 direct appeal in No. 42256. See Doc. 25, Ex. 11, at 1-4 (order); *id.*, Ex. 9, at 6-10 (brief). That
24 indeed is the basis given in the first amended petition for exhaustion of the ground.

25 Counsel must put more care into assuring that the papers filed by counsel are
26 supported both legally by nonfrivolous arguments and factually by the underlying record.
27 Ground 1 both states a claim upon which relief may be granted and is exhausted.

28 **Ground 2**

1 As to Ground 2, respondents similarly contend that the claim exhausted by petitioner
2 “in his state petition” was an ineffective assistance claim but federal Ground 2 instead is a
3 substantive claim. A federal habeas petitioner of course potentially can exhaust claims also
4 on direct appeal. The substantive claim in federal Ground 2 clearly was exhausted on direct
5 appeal, which is the basis for exhaustion stated in the first amended petition. See Doc. 25,
6 Ex. 11, at 4-6 (order); *id.*, Ex. 9, at 10-21 (brief). Ground 2 is exhausted.

7 **Ground 3**

8 Respondents make the same fundamental error with regard to Ground 3. The
9 substantive claim in federal Ground 3 clearly was exhausted on direct appeal, which is the
10 basis for exhaustion stated in the first amended petition. See Doc. 25, Ex. 11, at 6-9 (order);
11 *id.*, Ex. 9, at 21-27 (brief). Ground 3 is exhausted.

12 **Ground 6**

13 In Ground 6, petitioner alleges that he was denied effective assistance of trial counsel
14 when counsel allegedly failed to conduct an adequate pretrial investigation and to present trial
15 testimony by a competent investigator. Respondents contend that Ground 6 – without
16 qualification – fails to state a claim because petitioner does not allege specifically what
17 favorable testimony defense investigator Phil Needham would give.

18 The Court is not persuaded. Ground 6 provides three pages of factual specifics,
19 including regarding the testimony of the state’s crime scene analyst. Petitioner alleges that
20 defense counsel chose not to call Needham “to rebut the testimony of crime scene analyst
21 Larry Morton.” He further alleges, *inter alia*, that Needham’s testimony “would have supplied
22 a basis for doubting the State’s claim that the Arrowhead water bottle was found in the back
23 area of [a particular vehicle].” Even for a counseled petition, that perhaps would have been
24 enough specificity with the extensive context given. It clearly was so for a *pro se* petition.

25 Moreover, as discussed further, *infra*, following upon the submissions on the present
26 motion, the Court has reconsidered the prior denial of appointment of counsel. To the extent,
27 *arguendo*, that current Ground 6 could be alleged with more specificity, counsel will be able
28 to do so in the counseled amended petition. Ground 6 sufficiently states a claim for relief in

1 the *pro se* petition.

2 **Ground 10**

3 Respondents contend that Ground 10 is in part unexhausted. Respondents maintain
4 that the allegedly unexhausted portion of the claim was asserted in a petition that, at the time
5 of the filing of the motion to dismiss, still was before the state supreme court on a post-
6 conviction appeal, in No. 61909. The state supreme court since has issued an order of
7 affirmance and remittitur in No. 61909. The Court therefore does not hold, on the showing
8 made, that federal Ground 10 is unexhausted, following the conclusion of the state
9 proceedings.

10 **Ground 11**

11 Respondents contend that ground 11 is unexhausted on the following basis:

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13 In his state court petition, DUARTE asserted that his
14 counsel was ineffective for failing to argue on appeal that the
15 search warrant application contained factual errors. See ECF 22,
16 Ground 5. However, when presented in his federal petition, he
17 asserts a claim that the lack of a motion to suppress in view of not
being granted a hearing to determine the reliability of the
information in the affidavit is a wholly different theory. Because
the Nevada Supreme Court was never fairly presented this
question, the claim remains unexhausted and his mixed petition
must be dismissed.

18 Doc. 24, at 15.

19 The Court has difficulty following this argument. The second full sentence does not
20 appear to make grammatical sense. Moreover, if the Court is looking at the correct state court
21 claim,¹ the claim in federal court repeats a substantial portion of the corresponding state court
22 claim verbatim. While there is some different language toward the end of the federal claim,
23 both the federal and state claims include allegations that appellate counsel should have

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25 ¹The motion to dismiss begins by citing state court record exhibits according to their exhibit number in
26 the index of exhibits. Respondents thereafter cite to an "ECF 22" document that the Court is unable to
27 correlate to the state petition in question. The state court petition at Exhibit 22 does not appear to be the
28 petition to which respondents are referring. Counsel must do better when referring the Court to the relevant
portions of the state court record. In this case, respondents first missed claims clearly presented on direct
appeal and thereafter ambiguously referred the Court to state post-conviction claims where there are multiple
state court petitions in the record.

1 challenged the state district court's failure to grant a hearing on the motion to suppress to
2 determine the reliability of the information in the search warrant affidavit. See Doc. 25, Ex.
3 13, at 16, lines 13-19 (at electronic docketing page 63). The Court thus is at a loss as to how
4 to follow respondents' argument, much less provide a definitive ruling. The Court therefore
5 does not hold, on the showing made, that federal ground 11 is unexhausted.

6 ***Grounds 14 through 20***

7 Respondents contend that Grounds 16 and 18 to 20 fail to state a claim for relief and
8 that Grounds 14-18 are unexhausted. The Court defers consideration of any issues as to
9 these claims for two reasons.

10 First, following the conclusion of the proceedings on the last state petition, at the very
11 least the exhaustion issue may have become moot in whole or in part, subject then to any
12 procedural default issue that may arise based on the state court ruling. Second, the Court is
13 appointing counsel for petitioner. Any *arguendo* pleading deficiencies in the current *pro se*
14 pleading potentially may become moot following upon the filing of a counseled amended
15 petition.

16 ***Appointment of Counsel***

17 On reconsideration, following review of the papers presented on the current motion, the
18 Court finds that appointment of counsel would be in the interests of justice.

19 While petitioner referred previously to his Cuban heritage, he did not allege previously
20 in seeking counsel also that he was not sufficiently fluent in English to argue his case. Being
21 of Cuban descent does not necessarily signify that an individual is not fluent in English. In
22 reviewing the record on the present motion, it appears that petitioner did have a Spanish-
23 language interpreter in the state court proceedings.

24 Previously in this Court, petitioner apparently had another inmate help him with his prior
25 papers who no longer is available to him. His prior papers were articulate, cogent, and well-
26 reasoned. The opposition to the motion to dismiss is not, and it does not reflect a ready
27 command of the English language. *Inter alia*, petitioner failed to identify a number of obvious
28 fundamental flaws in meritless arguments made by respondents in the motion.

1 Accordingly, on reconsideration, the Court finds that justice most reliably would be
2 served in this matter by petitioner being represented by counsel who can provide meaningful
3 adversarial argument on the claims and issues presented in this case.²

4 **IT THEREFORE IS ORDERED** that respondents' motion (**Doc. 24**) to dismiss is
5 **DENIED** on the showing made.

6 **IT FURTHER IS ORDERED** that, on reconsideration, petitioner's prior motion (**Doc. 3**)
7 for appointment of counsel is **GRANTED**. The counsel appointed will represent petitioner in
8 all proceedings related to this matter, including any appeals or *certiorari* proceedings, unless
9 allowed to withdraw.

10 **IT FURTHER IS ORDERED** that the **Federal Public Defender shall be provisionally**
11 **appointed as counsel and shall have thirty (30) days to undertake direct representation**
12 **of petitioner or to indicate an inability to do so.** If the Federal Public Defender is unable
13 to represent petitioner, the Court then shall appoint alternate counsel. A deadline for the filing
14 of an amended petition and/or seeking other relief will be set after counsel has entered an
15 appearance. The Court anticipates setting the deadline for approximately one hundred twenty
16 (120) days from entry of the formal order of appointment. Any deadline established and/or
17 any extension thereof will not signify any implied finding of a basis for tolling during the time
18 period established. Petitioner at all times remains responsible for calculating the running of
19 the federal limitation period and timely presenting claims. That is, by setting a deadline to
20 amend the petition and/or by granting any extension thereof, the Court makes no finding or
21 representation that the petition, any amendments thereto, and/or any claims contained therein
22 are not subject to dismissal as untimely. See *Sossa v. Diaz*, 729 F.3d 1225, 1235 (9th Cir.
23 2013).

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25 ²Moreover, as a collateral benefit, the ultimate expeditious resolution of this matter further will be
26 fostered with counsel reliably referring the Court to the relevant portions of the state court record on the quite
27 large number of claims and issues presented in the case. On the present motion, the Court has not been
28 reliably referred to all record materials relevant to the defenses raised. The Court does not wish to try to
resolve claims on a 101-page petition where there may be a doubt as to whether the Court reliably is being
directed to the record materials relevant to an issue.

1 **IT FURTHER IS ORDERED** that, the Court's prior order (Doc. 16) barring successive
2 motions to dismiss that serially raise defenses shall not operate to prevent respondents from
3 raising any and all defenses then applicable to the counseled amended petition filed.

4 **IT FURTHER IS ORDERED** that counsel shall send a hard copy of the state court
5 record and all related exhibits filed to, for this case, the **Las Vegas Clerk's Office**.

6 The Clerk accordingly shall SEND a copy of this order, over and above the electronic
7 notice to respondents, to the *pro se* petitioner in proper person, the Federal Public Defender,
8 and the CJA Coordinator for this Division. The Clerk further shall provide the Federal Public
9 Defender with copies of all prior filings herein, by regeneration of notices of electronic filing
10 or through such other means as is expedient for the Clerk.

11 Dated: March 20, 2014.

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15 JENNIFER A. DORSEY
16 United States District Judge
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